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No. 10-281

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

JEROME K. LANNING, et al.,

Petitioners,

vs.

PATRICK PILCHER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Florida's ad valorem taxation cap on annual increases to the assessed valuations of property used as a homestead unconstitutionally discriminates against owners of second or vacation residences, whose primary permanent home is outside of the State.

LIST OF PARTIES

Petitioners:

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Joyce A. Lanning

Ann C. Reese, as personal representative of the estate of Marlow Reese

Respondents:

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Rhonda Skipper, individually and in her official capacity as Tax Collector of Walton County, Florida

Walton County, Florida

Walton County School Board

Timothy Smith, individually and in his official capacity as Property Appraiser of Okaloosa County, Florida

Chris Hughes, individually and in his official capacity as Tax Collector for Okaloosa County, Florida

Okaloosa County, Florida

City of Destin, Florida

Okaloosa County School Board

James Zingale, individually and in his official capacity as Executive Director of the Florida Department of Revenue

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STATEMENT OF THE CASE[1]

This case presents a challenge by out of state owners of second or vacation residences within Florida to the state's constitutional and statutory cap on annual increases to the assessed valuations of property used as a homestead. Article VII, section 4, Florida Constitution, commonly known as the Save Our Homes Amendment (SOHA), along with its implementing statute, section 193.155, Florida Statutes (2007), constitutionally limits increases in the annual assessed value for these homestead properties to three percent of the assessment for the prior year, or the percent change in the Consumer Price Index, whichever is less. This tax benefit is based on the way the property is used, and does not consider the residency of the property owner. The trial court ruled against Petitioners on their claims that the SOHA violated the dormant Commerce Clause, the Privileges and Immunities Clause, including the constitutional Right to Travel, the Equal Protection Clause, and the Due Process Clause of the U.S. Constitution.[2] The court of appeal affirmed, and the Florida Supreme Court denied Petitioners' Petition for review to that court.

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[1] References to the Petition and its Appendix are cited as "Pet. ___," and "Pet. App. ___," respectively.

[2] Petitioners' challenges based on Equal Protection and Due Process have been abandoned and are not the subject of their Petition.

In Florida, the protection of the primary home has a history of special significance. *See Osterndorf v. Turner*, 426 So. 2d 539, 540 (Fla. 1982). Under the Florida Constitution, homestead property has been protected from forced sale since 1868. In addition, in 1934, a homestead tax exemption of $5,000 was added. *Id.* This provision was modified through the years, and at the time of the underlying litigation, the Florida Constitution provided for a $25,000 ad valorem tax exemption for homestead property. Fla. Const. art. VII, § 6.

Although a previous version of the exemption was struck down in part by the Florida Supreme Court because it contained a five-year residency prerequisite, the current version does not have any such requirement. *Osterndorf*, 426 So. 2d at 545. Under this system, individuals are only allowed one homestead exemption. Fla. Const. art. VII, § 6(b); *Reinish v. Clark*, 765 So. 2d 197, 205 (Fla. 1st DCA 2000). "[T]he exemption distinguishes between real estate used in good faith as a Florida permanent residence, on the one hand, and (by implicit exclusion) any other real estate such as secondary or vacation residences or rentals, on the other hand." *Reinish*, 765 So. 2d at 205.

The SOHA became effective in 1993. The SOHA "was designed to ensure that citizens on fixed incomes will not lose their homes on the tax block due to the rising value of Florida property." *Smith v. Welton*, 729 So. 2d 371, 373 (Fla. 1999). By definition the SOHA cap applies to properties which receive the

$25,000 homestead exemption. Fla. Const. art. VII § 4(c);[3] Fla. Stat. § 193.155; *Zingale v. Powell*, 885 So. 2d 277, 285-86 (Fla. 2004) (providing both the exemption and SOHA cap are "parts of a coordinated constitutional scheme relating to taxation and have as their underlying purpose the protection and preservation of homestead property"). Accordingly, the application of the SOHA is entirely dependent on whether the property is a "permanent residence."[4] There is no waiting period for either the exemption or the SOHA cap to apply.

The homestead exemption, primarily, as well as the related SOHA cap, secondarily, were previously challenged, as in this case, by out of state owners of second or vacation residences within Florida. In a lengthy opinion issued in 2000, the Florida First District Court of Appeal upheld the homestead exemption under the Equal Protection Clause, the Privileges and Immunities Clause, including the

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[3] This provision has been renumbered as Fla. Const. art. VII, § 4(d), subsequent tc the initiation of this lawsuit.

[4] The Florida Statutes define "permanent residence" as

> that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred.

Fla. Stat. § 196.012(18).

Right to Travel, and the dormant Commerce Clause. *Reinish*, 765 So. 2d 197. The decision in *Reinish* was partially based on this Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), which upheld California's Proposition 13, implementing an acquisition-value property taxation scheme similar to Florida's SOHA, against a constitutional challenge under the Equal Protection Clause. Although review of the *Reinish* decision was sought, it was denied both by the Florida Supreme Court and this Court. *Reinish v. Clark*, 790 So. 2d 1107 (Fla. 2001); 534 U.S. 993 (2001).

In 2007, Petitioners filed their Complaint, challenging the constitutionality of the SOHA. After several amendments to the complaint, and after a hearing, the trial court dismissed the case, upholding the constitutionality of the SOHA based in large part on *Reinish* and *Nordlinger*. (Pet. App. B). The trial court also rejected an argument made by Defendants below, that the court lacked subject matter jurisdiction over the case pursuant to a Florida statute which required a challenge to a property tax assessment be brought within 60 days. *See* Fla. Stat. § 194.171.

Petitioners appealed to the Florida First District Court of Appeal, and certain Respondents cross-appealed the determination on subject matter jurisdiction. The First District affirmed the judgment of the trial court in all respects. *Lanning v. Pilcher*, 16 So. 3d 294 (Fla. 1st DCA 2009); (Pet. App. A). On the subject of the constitutional challenges, the First District concluded that all of the arguments had been rejected in comparable cases, and cited both

Nordlinger and *Reinish*. *Id.* at 297. As in *Reinish*, the court noted that the "tax benefit is based on the way the property is used, not on the status of the landowner as a resident or nonresident." *Id.* Petitioners sought review of this decision in the Florida Supreme Court, but as in *Reinish*, that court declined to accept jurisdiction and denied the Petition. *Lanning v. Pilcher*, 37 So. 3d 847 (Fla. 2010); (Pet. App. C).

As Petitioners note, this is chronologically the first of three similar cases challenging the SOHA in the Florida courts since 2007. The second of these cases is a challenge by newly relocated owners of homestead property to the SOHA on the basis of Right to Travel and Equal Protection. *Bruner v. Hartsfield*, 23 So. 3d 192 (Fla. 1st DCA 2009). While that case was pending, Article VII, sections 4 and 6 of the Florida Constitution were amended by "Amendment 1," approved by the Florida voters in 2008. This amendment increased the homestead exemption, and also added a "portability" provision to the SOHA. Portability allows an owner of homestead property to transfer all or a portion of any benefit received under the SOHA to a new Florida homestead. The plaintiffs in *Bruner* amended their complaint to also challenge the portability of the SOHA. The trial court rejected this challenge, which was affirmed on appeal. *Id.* The *Bruner* plaintiffs sought review before the Florida Supreme Court, but as in the present case, the court declined to accept jurisdiction and denied the Petition. *Bruner v. Hartsfield*, 37 So. 3d 846 (Fla. 2010).

The *Bruner* plaintiffs have also filed a Petition for Writ of Certiorari to this Court in Case No. 10-276.

The final case is a challenge by out of state owners of second or vacation homes to the SOHA and the new portability provision under the dormant Commerce Clause and Privileges and Immunities Clause. The trial court ruled the SOHA, as amended, constitutional and dismissed the case. However, the court also dismissed the case for lack of subject matter jurisdiction. *Deluccio v. Havill*, 25 So. 3d 31 (Fla. 1st DCA 2009). The Florida First District ruled this was error, and reversed and remanded on this basis. *Id.* On remand, the court entered an order ruling that the SOHA and the portability provision are constitutional. The Florida First District has affirmed that order. *Deluccio v. Havill*, 35 Fla. L. Weekly D2052 (Fla. 1st DCA Sept. 13, 2010). The *Deluccio* plaintiffs have sought review of the decision in the Florida Supreme Court.

ARGUMENT

I. Decisions of This Court and Various State Courts Have Consistently Upheld Tax Structures Similar to Florida's Taxation of Homestead Property and There is No Conflict Among the States.

This case does not warrant further review. The subject of this lawsuit is not new or novel. Although Petitioners present five separate questions for this

Court's consideration, the issue in this case is simply whether a property tax benefit for homestead property for the purpose of preserving the primary permanent home is unconstitutionally discriminatory against those whose permanent residence is in another state. Consistent with all other jurisdictions which have ruled on this issue, the Florida appellate court properly answered this question in the negative. In upholding the constitutionality of the SOHA, the Florida First District Court of Appeal relied on well-reasoned and analogous case law, including the Florida First District's earlier decision in *Reinish*, and this Court's decision in *Nordlinger*, providing clear support for the decision in this case. In addition, the decisions identified by Petitioners as conflicting authority are no such thing.

In *Nordlinger*, this Court's decision on a similar tax structure, the Court upheld California's Proposition 13, which was challenged on the basis of Equal Protection. Proposition 13 capped real property taxes at one percent of a property's full cash value. In addition, there was a two percent cap on annual increases in the assessed valuation. *Nordlinger*, 505 U.S. at 5. The Court considered the "dramatic disparities" in the taxes paid by persons owning similar pieces of property, which continue to grow over time. *Id.* at 6. For example, the Petitioner, a recent purchaser of residential property, paid about five times more in taxes than some of her neighbors, who had owned comparable homes for a number of years. *Id.* at 7. The Court determined that Proposition 13 passed a rational basis, Equal Protection review, and

identified two legitimate state interests which were rationally furthered by the law. First, "the State has a legitimate interest in local neighborhood preservation, continuity, and stability." Second, "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12.

Several years later, the Reinishes, out of state owners of second or vacation homes in Florida, challenged Florida's tax exemption for homestead property. *Reinish*, 765 So. 2d 197. Although the primary challenge was to the tax exemption, the tax payers in that case also included an argument that the related SOHA cap on the annual change in the assessment for homestead property was unconstitutional. *Id.* at 213. The Reinishes raised the same constitutional arguments as are raised in the present case, including the dormant Commerce Clause, the Privileges and Immunities Clause including the Right to Travel, and Equal Protection.

In a lengthy opinion, the Florida First District rejected each of the Reinishes' constitutional challenges, and upheld the homestead exemption. The court, in part, relied on this Court's decision in *Nordlinger*. *Id.* at 203-04. Approximately seven years after the decision in *Reinish*, the Petitioners brought suit here, in what is simply an extension of the same arguments raised in *Reinish*, a case which this Court declined to review. *Reinish v. Clark*, 534 U.S. 993 (2001).

As Petitioners acknowledge, several state court decisions on similar tax schemes have ruled in line with *Nordlinger* and *Reinish*. *See Rubin v. Glaser*, 416 A.2d 382 (N.J. Sup. Ct. 1980) (upholding tax rebate for homestead property challenged on Privileges and Immunities and Equal Protection grounds), *appeal dismissed*, 449 U.S. 977 (1980); *Citizens for Unif. Taxation v. Northport Pub. Sch. Dist.*, 608 N.W.2d 480 (Mich. Ct. App. 2000) (upholding homestead exemption for school property taxation challenged on Privileges and Immunities and Equal Protection grounds), *pet. denied*, 531 U.S. 993 (2000); *Markham v. Comstock*, 272 A.D.2d 971 (N.Y. App. Div. 2000) (upholding tax exemption of primary residence challenged on Privileges and Immunities and Equal Protection grounds), *pet. denied*, 531 U.S. 1079 (2001); *Columbus-Muscogee County Consol. Gov't v. CM Tax Equalization, Inc.*, 579 S.E.2d 200 (Ga. 2003) (upholding, on Equal Protection, Due Process, and Right to Travel grounds, a local constitutional amendment that froze the assessed value of homestead property; citing to *Nordlinger*), *pet. denied*, 540 U.S 878 (2003); *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268 (Alaska 2003) (upholding $10,000 exemption of homestead property on Equal Protection and Right to Travel grounds). None of these courts were troubled by claims that property used as homestead property was taxed differently than other types of property, and none concluded that this amounted to unconstitutional discrimination.

Petitioners fail to cite any case that is in conflict with these decisions. Attempting to establish conflict, Petitioners discuss several factually dissimilar cases[5] which cite to the principle asserted by this Court in *Dean Milk Co. v. Madison*, 340 U.S 349 (1951), that discrimination of a state law against some residents does not justify its discrimination against non-residents. (Pet. at 31). This argument misses the point. In this case there simply is no discrimination against similarly situated taxpayers, and therefore, the above referenced principle stemming from *Dean Milk Co.* is not applicable. Petitioners' perceived conflict in the law is an aberration.

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[5] The factual underpinnings of this case are clearly distinctive from the State cases Petitioners cite. *Homier Distrib. Co., Inc. v. City of Albany*, 681 N.E.2d 390 (N.Y. 1997) (Commerce Clause challenge to tax on "transient" retailers who operate at temporary business sites); *In re the Appeal of CIG Field Servs. Co.*, 112 P.3d 138 (Kan. 2005) (Commerce Clause and Equal Protection challenge to gas gathering system tax which gave different treatment to interstate and intercounty gas gathering systems as compared to intracounty gas gathering systems); *Opinion of the Justices to the House of Representatives*, 702 N.E.2d 8 (Mass. 1998) (Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause challenge to an Act which reduced a ten dollar surcharge on the rental of vehicles in the city of Boston to three dollars for only residents of that city); *Sanifill, Inc. v. Kandiyohi County, Minnesota*, 559 N.W.2d 111 (Minn. Ct. App. 1997) (Commerce Clause challenge to county's Management Service Fee and landfill tipping fee which would require users of out of state landfills to pay a portion of the county landfill costs even if they do not use the county landfill).

There is good reason for the consistent case law on this subject. The SOHA, similar to the treatment of homestead property in other states, does not discriminate against out of state property owners. As succinctly stated in *Reinish*, the difference in taxation is based on the use of the property, and not the user. 765 So. 2d at 205, 214. The application of the homestead exemption and the SOHA cap does not hinge on residency. Although Petitioners suggest otherwise, not all Florida residents are entitled to the application of the SOHA cap, only those with homestead property. Additionally, the SOHA cap does not provide a tax benefit to Florida residents on all of their Florida real estate, but only on the primary permanent home.

The protection of the primary home, the purpose of both the Florida homestead exemption and the SOHA cap, is a legitimate state interest. *Reinish*, 765 So. 2d at 214-15 (concluding that "the Florida exemption is an even-handed regulation that promotes the legitimate strong public interest in promoting the stability and continuity of the primary permanent home"); *see also Rubin*, 416 A.2d at 386 (providing "we emphasize that the Act's application solely to principal places of residence is closely related to the beneficial purpose of alleviating the heavy realty tax burden"); *Stanek*, 81 P.3d at 271 (providing "the exemption is evidently designed to protect and promote home ownership" which is "widely thought to be beneficial to the community because it promotes stability, a sense of commitment to the community,

civic responsibility, and a measure of financial independence"); *Citizens for Unif. Taxation*, 608 N.W.2d at 484 (agreeing with the lower court that "the Legislature's interest in granting an exemption to homestead property is to protect and promote homestead property, . . . which is a legitimate state interest").

These same interests are not implicated by residential property used as a second or vacation home. *See Reinish*, 765 So. 2d at 210 ("A secondary or vacation home does not implicate the same acute public policy concerns relating to the establishment and protection of a stable, financially secure primary residence."). Discrimination assumes a comparison of substantially similar entities. *See Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 342 (2008); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). In this case, all owners of second or vacation homes in Florida, whether their primary permanent residence is in state or out of state, are treated exactly the same by Florida law. There simply is no discrimination that would implicate the dormant Commerce Clause, the Privileges and Immunities Clause, or the constitutional Right to Travel.

A. The SOHA Cap Does Not Unconstitutionally Discriminate Against Interstate Commerce.

With regard to the argument that the SOHA cap violates the "dormant" Commerce Clause, there is no

violation because there is no discrimination to interstate commerce in either purpose or effect. *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977) (providing that a state tax will be sustained against a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State"). Florida's homestead tax provisions apply equally, regardless of the residency of a particular purchaser, and are based on the use made of that property. *See Reinish*, 765 So. 2d at 214 (providing that the Florida homestead tax exemption "neither distinguishes between Florida residents and non-residents nor disparately treats identically situated persons. The focus of the exemption is on the use of the property itself, and not on the user.").

This case presents a situation which is a far cry from the economic isolationist laws invoking the protections of the "dormant" Commerce Clause. The SOHA cap does not place burdens on the flow of commerce across the state's borders that commerce wholly within its borders would not bear, *Am. Trucking Ass'ns Inc. v. Michigan Pub. Servs. Comm'n*, 545 U.S. 429, 433 (2005), nor does it apply "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers*, 550 U.S. at 338 (quoting *Or. Waste Sys., Inc. v. Dep't of Envrtl. Quality*, 511 U.S. 93 (1994)).

The homestead provisions in the Florida constitution, including the SOHA cap, are motivated by the protection of the primary permanent home, which relates to the welfare of Florida's citizens, and these provisions do not impose an undue and discriminatory burden on commerce. *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) ("We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was 'never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" (citation omitted)); *Dep't of Revenue of Ky.*, 553 U.S. at 342 (noting the Court's reluctance to interfere with a traditional governmental function on Commerce Clause grounds where it would result in the invalidation of a century-old taxing practice, relating to the protection of the health, safety, and welfare of citizens). Florida has been providing constitutional protection in one way or another for homestead property for well over a century. *See Osterndorf*, 426 So. 2d at 540.

Petitioners raise several strained and convoluted arguments under the commerce clause, which do not merit this Court's attention. Petitioners suggest that the SOHA violates the "internal consistency test," discussed in *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987). (Pet. at 17-18). However, as the tax is a tax on real property, the adoption of identical schemes in every state would not result in

multiple taxation of the same property. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *Pfizer, Inc. v. Lancaster County Bd. of Equalization*, 616 N.W.2d 326, 339 (Neb. 2000) (citing *Oklahoma Tax Comm'n*). To accept Petitioners' argument on this issue would be to conclude that any variation in ad valorem real property taxation schemes of the states would result in a Commerce Clause infirmity to all of those taxation statutes. *See Pfizer*, 616 N.W.2d at 339.

It is doubtful that Petitioners have any standing at all to raise the argument that the SOHA deters commerce among the states by discouraging relocations, and this argument is attenuated at best. (Pet. at 18-19). Petitioners are not alleging that they have been precluded or discouraged from relocating themselves, nor could they in the context of this case, as they own no homestead property within Florida. Any impact that the SOHA has on the decision of owners of homestead property to relocate outside of Florida would be negligible.

In addition, many of Petitioners' arguments are based on the faulty logic that the "benefit" that may be provided to homestead property owners is predictable, and reliably increases over time. However, any tax benefit that may be provided by application of the SOHA cap to homestead property is tied to the market. This benefit can change year to year, and can decrease depending on market conditions. It would be impossible to predict how much "benefit" will accrue to homestead property owners at any given time, and

in some circumstances, no benefit will be provided. For example, in a down market, the Florida Department of Revenue's "recapture rule" requires property appraisers to increase the assessment by either three percent or the percentage change in the Consumer Price Index in any year that the property's just value exceeds its assessed value, regardless of whether there has been an increase in just value. Fla. Admin. Code R. 12D-8.0062. This could result, over time, in an equalization of the just value and assessed value, so that no actual "benefit" is provided by the SOHA cap.

In an apparent attempt to detract from the fact that the taxation of Petitioners' property is treated the exact same way as every other residence used as a second or vacation home within Florida, Petitioners reference a perceived interrelation between the SOHA cap and the Florida Education Finance Program, or FEFP, which is the primary source of funding for school operational purposes, and is made up of both state (sales tax) and local money (ad valorem taxation). *See* Fla. Stat. Ch. 1011, Part II.[6] (Pet. at

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[6] Each year the legislature determines the total amount of money to be spent per student for education, and what percentage of this money is to come from state and local sources respectively. As part of the FEFP, all school districts must levy required local effort at a millage rate not to exceed that certified by the Commissioner of Education. The school districts have no discretion in setting this millage rate. Despite Petitioners' attempted summary of the effects of this system, there are many

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21-24). However, nothing in the FEFP alters the well established fact that owners of second and vacation residences are all treated exactly the same, regardless of the location of their permanent residences. Petitioners' statement that a higher tax is imposed only on non-residents (Pet. at 23) is an astounding leap in logic and completely unsupported. *Cf. Citizens for Unif. Taxation*, 608 N.W.2d 480 (determining that a homestead exemption from ad valorem taxation for school operating purposes was not unconstitutional discrimination, and did not "impose substantially the entire tax burden on nonresident property owners," where both nonresident and resident owners of recreational property were equally subject to the school operating mills).

At best, Petitioners here are attempting to raise an argument that the ad valorem taxation of their property is not fairly related to the services provided by the State, under the fourth prong of the *Complete Auto Transit* test. 430 U.S. at 279. However, the dormant Commerce Clause does not require that the use of ad valorem taxes be directly equated to the services provided to Petitioners. The tax is assessed based on the value of the property, which is in direct relation to activities or presence in the State. Petitioners are provided services such as fire service, police protection, and public schools, all of which are

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complexities built into the FEFP which need not be detailed here.

benefits conferred by the fact of being an orderly society, and each protects the value of the property Petitioners own in the State. *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 625, 627 (1981). So long as a general revenue tax, such as an ad valorem property tax, does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State

> is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, [and] to benefits which it has conferred by the fact of being an orderly, civilized society.

Id. at 625.

B. The Privileges and Immunities Clause is Not Implicated.

Petitioners' arguments with respect to the Privileges and Immunities Clause are likewise unconvincing. The Privileges and Immunities Clause governs only those rights or activities which are fundamental in the sense that interference would "hinder the formation, the purpose, or the development of a single Union . . . " *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383 (1978). "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must

the State treat all citizens, resident and nonresident, equally." *Id.*

In the present case, there is no fundamental or essential right violated by the denial of the homestead tax exemption or the SOHA to owners of properties used for other purposes. *See Reinish*, 765 So. 2d at 209. The application of the SOHA does not deny equal treatment to non-residents, nor does it discriminate against them. The application of the SOHA is based upon the use that a party makes of its residential property, regardless of whether the property is owned by residents of Florida or residents of other states. This point was clearly made in *Reinish*.

Residents of Florida, like non-residents, are not entitled to application of the SOHA to their secondary or vacation residential properties. Petitioners and other non-residents have no right to any preferential treatment on the taxation of their secondary or vacation homes inside the state of Florida. *See Shaffer v. Carter*, 252 U.S. 37, 53 (1920) ("Section 2 of Art. IV of the Constitution entitles [a non-resident] to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption."). The difference in treatment in this case arises not from discrimination of similarly situated property owners, but from the application of the provision to two separate classes of properties. Florida legitimately may lessen the tax burden for owners of primary homes within Florida, as compared

with that of owners of residential property utilized as secondary or vacation homes. Because Petitioners do not maintain their primary residences in Florida, they, like all other owners of secondary or vacation homes in the State, will not be afforded the same tax benefit as those with homesteads in Florida.

Rubin is instructive on this issue. 416 A.2d 382. The Supreme Court of New Jersey considered a constitutional challenge to a homestead tax rebate. Appellants were non-resident owners of a second or vacation home in New Jersey. The court concluded that the homestead rebate act satisfied the requirements of the Privileges and Immunities Clause because it bore a close relationship to a proper purpose irrespective of the impact upon non-residents. *Id.* at 386. First, the court found that the rebate was closely related to the beneficial purpose of alleviating the heavy realty tax burden, and that the Legislature did not intend to foster the ownership of vacation homes or other homes not maintained as principal residences. Second, the statutory aim was not directed against non-residents. The court found that New Jersey residents who own vacation homes in New Jersey were treated the same as non-residents with respect to the rebates. *Id.* at 386-87. The Florida homestead tax scheme, including the SOHA, like the homestead rebate, "provides no greater, or lesser, benefit to Florida owners of secondary homes than it does to . . . non-residents." *Reinish*, 765 So. 2d at 210; *see also Citizens for Unif. Taxation*, 608 N.W.2d at 483 (ruling that Michigan's tax exemption of homestead property with regard to school property

taxation did not treat non-residents and residents differently, and therefore, did not implicate the Privileges and Immunities Clause); *Markham*, 272 A.D.2d at 973 (ruling that New York's tax exemption of primary residences does not favor New York residents over non-residents, and because residents and non-residents are treated alike, the Privileges and Immunities Clause is not implicated).

As any resulting inequality based on the SOHA is only incidental to the application of the tax system, and does not reflect hostile discrimination, Petitioners have failed to show any error on the basis of the Privileges and Immunities Clause. *Reinish*, 765 So. 2d at 209; *see also Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) (providing that "inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of the [tax] system that is not arbitrary in its classification, are not sufficient to defeat the law.").

C. The SOHA Cap Does Not Violate the Right to Travel.

Likewise, Petitioners have failed to make a compelling case that the decision below was deficient with regard to the constitutional Right to Travel. Petitioners accurately identify the "three components" of the Right to Travel discussed by this Court in *Saenz*:

> It protects the right of a citizen of one State to enter and to leave another State, the right

> to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500 (1999).

None of these three components are violated in this case. Petitioners, as non-resident owners of second or vacation homes in the State of Florida, are provided no greater or lesser benefit than Florida residents. Petitioners, as well as Florida residents, are free to buy, keep, or dispose of vacation or second homes in Florida. Additionally, the State does not infringe upon the constitutional guarantee "that individuals may migrate between States to live and work." *Reinish*, 765 So. 2d at 210. As the trial court found, Petitioners have not identified any obstacle preventing any of them from traveling to or from Florida, or any impediment to travel at all (Pet. App. B at 22).[7]

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[7] Though Petitioners may seek to characterize the application of SOHA as a durational requirement, it is no such thing. The application of SOHA is available without any durational requirements. To the extent that non-residents enter the State and seek to become permanent residents, they need only establish a residence in Florida as their permanent residence, and they are then entitled to the same benefits as all other permanent residents, based upon that use. *See Reinish*, 765 So. 2d at 204-205. The SOHA applies after a homestead is established,

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Petitioners attempt to make an argument regarding Florida residents' choice to leave the state. However, clearly Petitioners have no standing to raise an issue with regard to permanent residents of Florida. *See Nordlinger*, 505 U.S. at 10-11 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984), for the "general prohibition" on a litigant's raising another person's legal rights). By Petitioners' own assertions, they are non-resident owners of property within Florida. Accordingly, Petitioners' arguments on this basis should be disregarded by this Court, as Petitioners have no standing to raise such issues.

None of Petitioners' arguments raise any doubt that the Florida First District's decision is correct as a matter of law, and consistent with the jurisprudence of this Court and decisions of state courts addressing the issues raised herein. Because the decision of the Florida appellate court is correct in all respects regarding Petitioners' constitutional challenges to the SOHA, there is no cause for this Court to accept review.

II. The *Pike* Analysis is Inapplicable.

As an extension of Petitioners' dormant Commerce Clause analysis, Petitioners assert that the case should be remanded because the trial court failed to conduct the balancing test set forth in this

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and this is not dependent on whether the property owner came from in state or out of state.

Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). However, because *Pike* generally applies in cases challenging state regulatory provisions, not in cases such as this one involving state taxation, this balancing test is inapplicable here. *See Complete Auto Transit*, 430 U.S. 274 (applying a separate four prong test in the case of a state tax); *Dep't of Banking & Finance v. Credicorp, Inc.*, 684 So. 2d 746 (Fla. 1996) (outlining the two separate legal standards that apply to (1) a general revenue tax or (2) a regulatory measure enacted pursuant to the state's police powers); *see also Dep't of Revenue of Ky.*, 553 U.S. at 355-56 (criticizing certain applications of the *Pike* balancing test). *But see Reinish*, 765 So. 2d at 214 (conducting the *Pike* balancing test and concluding that the Reinishes had not shown the effects of the Florida homestead tax scheme on interstate commerce were anything more than incidental, "or that the burden imposed on such commerce is clearly excessive when compared to the asserted local benefits").

III. Petitioners' Arguments Regarding the Correctness of Legislative Policy Do Not Create an "Issue of Great Importance" for This Court.

Petitioners attempt to persuade this Court that Florida's SOHA contributed to the real estate bubble (Pet. at 14) and has contributed to the cycle of boom and bust, and now needs to be reformed (Pet. at 15). This is not a persuasive reason for this Court to

undertake review of this case, as this is an argument for policy reform, and is separate from the question of constitutional validity of the law. *See Nordlinger*, 505 U.S. at 17 (stating "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted"). Additionally, this Court is not the proper forum for evaluating such complex interactions between the state's taxation of homestead property and the housing market. *See Dep't of Rev. of Ky.*, 553 U.S. at 353-56; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997). As the Petitioners fail to identify any constitutional infirmities or any conflict in the relevant case law, this Court should decline Petitioners' request to upset the will of the people of Florida. *See Nordlinger*, 505 U.S. at 17.

IV. Petitioners' Argument Regarding the Type of Relief Claimed is Not an Appropriate Ground for Certiorari.

Petitioners reference pure dicta in the Florida District Court's opinion that "[i]f this court were to find the provision and statutes unconstitutional, this would not entitle the plaintiffs to a reduction or a refund," and argue that in the event this Court determines the SOHA is discriminatory, the Court should also address Petitioners' entitlement to their requested relief. (Pet. at 37). First, this Court should decline Petitioners' invitation to address this issue,

because the holding of the Florida First District, that the SOHA is constitutional, is correct as a matter of law, and does not merit review. In addition, as recently explained, "when this Court – on review of a state high court's decision – finds a tax measure constitutionally infirm, 'it has been our practice,' for reasons of 'federal-state comity,' to abstain from deciding the remedial effects of such a holding." *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2334 (2010) (citations omitted). Even if this Court were to grant review and determine the SOHA unconstitutional, the proper procedure would be to remand the case, leaving the remedial choice in the hands of state authorities. *Id.* This is not a proper ground for review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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